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9 SOTHEBY'S, INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 STEVEN BROOKS,

14 Plaintiff,

15 v.

16 SOTHEBY'S, SOTHEBY'S, INC., and DOES
17 1 through 10, inclusive,

18 Defendants.

Case No.: 3:13-cv-02183-RS

**REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS FIRST
AMENDED COMPLAINT BY
DEFENDANTS SOTHEBY'S AND
SOTHEBY'S, INC.**

(FRCP 12(b)(3))

Date: June 27, 2013
Time: 1:30 p.m.
Location: Courtroom #3, 17th Floor
Judge: Honorable Richard Seeborg

1 I. INTRODUCTION

2 This dispute arises out of Plaintiff Steven Brooks' purchase of a painting in 2004 at an
 3 auction in London, England, conducted by Sotheby's, a registered company in England and Wales
 4 ("Sotheby's London"). The parties agree (1) that the purchase was made pursuant to the
 5 Conditions of Business contained in Sotheby's London's auction catalogue, (2) that those
 6 Conditions of Business contain a forum selection clause vesting exclusive jurisdiction for this
 7 dispute in the Courts of England, and (3) that if the forum selection clause is enforceable then this
 8 case should be dismissed. The only points of disagreement are Brooks' arguments that the forum
 9 selection clause is unenforceable either because of California public policy or because Brooks
 10 claims he did not have sufficient notice of the clause.

11 These arguments fail. There is no evidence that Brooks' claims would be barred or that his
 12 remedies would be any different if the forum selection clause were enforced. Moreover, Brooks'
 13 argument about public policy is based on a logical fallacy because enforcement of the forum
 14 selection clause does not mean that a court in England would not look to the law of California to
 15 decide Brooks' claims pursuant to a conflict-of-laws analysis under English law. There is also no
 16 evidence that Brooks did not receive sufficient and reasonable notice of the forum selection
 17 clause. Before purchasing the painting at issue in 2004, Brooks had made more than 30 prior
 18 purchases from Sotheby's London's auctions—all pursuant to the same forum selection clause.
 19 The auction catalogue for the 2004 auction as well as all of the prior auctions contained the forum
 20 selection clause under the bold-faced heading **Law and Jurisdiction**. The invoice Brooks
 21 received made specific reference to these Conditions of Business. In this context, Brooks decided
 22 to spend \$96,000 on a single painting. Brooks had every incentive and ability to determine the
 23 conditions under which he made this purchase. Under these circumstances, it is entirely
 24 reasonable to enforce the forum selection clause contained in the Sotheby's Conditions of
 25 Business. Indeed, it would upend the settled expectations of thousands of bidders and sellers
 26 worldwide who participate in Sotheby's auctions to learn that the Conditions of Business do not
 27 actually govern these transactions.

1 Under Supreme Court and Ninth Circuit authorities as well as multiple decisions by the
2 Courts of this District, the forum selection clause must be enforced, and this case must be
3 dismissed.

4 II. STATEMENT OF FACTS

5
6 As noted, the parties agree on the legal standard here and that Brooks has the burden of
7 demonstrating why the forum selection clause is unenforceable. In support of his opposition to
8 this motion, Brooks has submitted a declaration that states that he “did not notice” the forum
9 selection clause and then states four paragraphs of irrelevant facts regarding the alleged merits of
10 his claims. Brooks has also submitted a Request for Judicial Notice and a declaration from his
11 counsel introducing exhibits that appear designed to show that Defendants should be amenable to
12 jurisdiction in this district. These exhibits are irrelevant to the question of whether the forum
13 selection clause is enforceable.¹

14 Brooks has not disputed any of the evidence submitted by Defendants in support of this
15 motion, and he has failed to submit any evidence in support of his arguments regarding
16 contravention of California public policy.

17 III. ARGUMENT

18
19 Defendants’ opening memorandum stated (1) that forum selection clauses provide grounds
20 for dismissal under Federal Rule of Civil Procedure 12(b)(3), (2) that the court need not accept the
21 pleadings as true and may consider facts outside the pleadings, and (3) that the burden is on
22 Brooks to demonstrate that venue is proper in light of the forum selection clause. In his
23 opposition, Brooks concedes that Defendants have properly stated the legal standard for this

24
25 ¹ Exhibit 4 to Plaintiff’s Request for Judicial Notice does, however, demonstrate why it is entirely
26 reasonable for Defendants to expect the forum selection clause will be enforced—as noted on a
27 page from Sotheby’s website, Sotheby’s “reaches every point of the global art market, with 90
28 locations in 40 countries,” and there are “approximately 250 auctions each year in ten salerooms
around the world” Plaintiff’s Request for Judicial Notice in Opposition to Motion to Dismiss

1 motion and that Brooks bears the burden on this motion. Brooks argues only that the forum
 2 selection clause is unenforceable because (1) it contravenes the public policy of California and (2)
 3 he did not have reasonable notice of it when he paid \$96,000 for the painting. As set out in detail
 4 below, both of these arguments are wrong. The agreement that venue for Brooks' claims would
 5 be exclusively in the courts of England does not contravene any public policy of California, and
 6 Brooks has provided no evidence to the contrary. Brooks does not deny that he made 31
 7 purchases from Sotheby's London's auctions in London prior to the one in question, and he has
 8 failed to demonstrate that he did not have adequate notice of the forum selection clause.

9
 10 A. The Forum Selection Clause In Sotheby's Conditions Of Business Does Not
 11 Contravene Any Public Policy Of California

12 Brooks argues that the forum selection clause in the Sotheby's Conditions of Business is
 13 unenforceable because it contravenes the public policy of California. In support of this argument,
 14 Brooks relies on the provisions of the California Consumers Legal Remedies Act ("CLRA"),
 15 California common law regarding the tolling of statutes of limitation in certain circumstances, and
 16 the Ninth Circuit's *per curiam* decision in *Doe v. AOL LLC*, 552 F.3d 1077 (9th Cir. 2009).
 17 Brooks' reliance is misplaced: the *AOL* case is clearly distinguishable from the present case,
 18 Brooks has made no showing that English law does not provide the same or equivalent remedies
 19 as are available under California law, and, in any event, the instant motion does not seek a choice
 20 of law determination.

21 In *Doe v. AOL LLC*, AOL moved to dismiss a consumer class action lawsuit under Rule
 22 12(b)(3) on the basis of a forum selection clause in the AOL Member Agreement. 552 F.3d at
 23 1078. The AOL Member Agreement contained a provision that designated Virginia law,
 24 *excluding its conflict-of-law rules*, and designating the forum as the "courts of Virginia." *Id.* at
 25 1080. The Ninth Circuit interpreted the "courts of Virginia" to mean the state courts in Virginia
 26 and to exclude jurisdiction in the federal courts situated in Virginia. *Id.* at 1082. As a result, the
 27 court found that the forum selection clause contravened California public policy because (a) it
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1 required application of Virginia law excluding Virginia's conflict-of-laws rules such that the
 2 Virginia court would not be able to determine whether California law might properly be applied to
 3 a case filed in Virginia, and (b) consumer class actions are not available in Virginia state courts.
 4 The combination of the choice of law provision with the forum selection clause resulted in a
 5 violation of California public policy "by forcing [plaintiffs] to waive their rights to a class action
 6 and remedies under California consumer law." *Id.* at 1084.

7 This case is clearly distinguishable here. The Sotheby's Conditions of Business do not
 8 exclude a conflict-of-laws analysis. The "Governing Law" provision states that "[t]hese
 9 Conditions of Business and all aspects of all matters, transactions or disputes to which they relate
 10 or apply shall be governed by and interpreted in accordance with English law." Declaration of
 11 Claudia Lisette Aguilar ("Aguilar Decl.") ¶2 & Ex. A. Under English law, a court in England may
 12 well decide that California law should apply to some or all of Brooks' claims. Certainly nothing
 13 in the Conditions of Business would preclude Brooks from arguing that the court in England
 14 should apply English conflict-of-laws rules to his claims and that California law should govern.

15 Despite bearing the burden of demonstrating unenforceability of the forum selection
 16 clause, Brooks has made no showing whatsoever regarding English law and whether or not it
 17 would provide the same or equivalent remedies as are available under California law. By contrast,
 18 in *AOL* the plaintiffs demonstrated that consumer class actions were not available in Virginia state
 19 court and that they were available under California law. This difference is crucial to the Court's
 20 adjudication of this motion. All Brooks has done is recount what remedies and law are available to
 21 him here in California. He has failed to provide any evidence regarding what equivalent remedies
 22 would be available to him in England under the laws of England, or whether or not a court in
 23 England might be persuaded to apply California law to one or more of his claims.²

24
 25 ² Defendants do not concede that California law would govern Brooks' claims even if they were to
 26 be adjudicated in this Court. The transaction at issue took place in London and was expressly
 27 conducted under the laws of England. There is little basis here for application of California law to
 28 these claims under California choice-of-law jurisprudence. *See Nedlloyd Lines B.V. v. Superior*
Court, 3 Cal. 4th 459, 465 (1992) (holding that choice of law provisions are presumptively valid
 (footnote continued))

1 Numerous District Court opinions have reached the same conclusion in enforcing forum
 2 selection clauses despite arguments that California public policy would be contravened. In
 3 *Madanat v. First Data Corp.*, 2011 WL 208062 (N.D. Cal. Jan. 21, 2011), the court distinguished
 4 the *AOL* case and enforced a forum selection clause where the plaintiff failed to show that he
 5 would be barred from pursuing his claims in the selected venue and failed to demonstrate any
 6 differences between the remedies available in California and the selected venue. *Id.* at *4.
 7 Likewise, in *Mazzola v. Roomster Corp.*, 2010 WL 4916610 (C.D. Cal. Nov. 30, 2010), the court
 8 distinguished *AOL* and held that “enforcing the forum selection clause itself does not amount to a
 9 deprivation of Plaintiff’s rights under [the CLRA].” *Id.* at *4 (noting that unlike in *AOL*, the
 10 plaintiff had “made no showing that New York law—assuming it did apply to her action—does
 11 not provide the same or equivalent remedies as are available under California law”).

12 Courts have also noted that parties opposing forum selection clauses often conflate the
 13 question of the forum with the question of what law will be applied in that forum. For example, in
 14 *Besag v. Customer Decorators, Inc.*, 2009 WL 330934 (N.D. Cal. Feb. 10, 2009), the court
 15 enforced a forum selection clause and observed that “[i]ndirect attacks [on a forum selection
 16 clause] based on what substantive law will ultimately apply to a party’s claims are problematic
 17 because they require courts to speculate as to the potential outcome of the litigation on the merits
 18 in the [selected] forum and to consider whether that outcome would conflict with a strong public
 19 policy of the [original] forum at the outset of the action.” *Id.* at *14 (quotation marks omitted).
 20 Similarly, in *Swenson v. T-Mobile USA, Inc.*, 415 F. Supp. 2d 1101 (S.D. Cal. 2006), the court
 21 found that the plaintiff had “cleverly, *but impermissibly*, combin[ed] the forum selection clause

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 23 and uniformly enforced unless (1) the chosen jurisdiction does not have a “substantial relationship
 24 to the parties or their transaction” and there is no other reasonable basis for the parties’ choice of
 25 law, or (2) the chosen state’s law is contrary to a fundamental public policy of California and
 26 California has a materially greater interest in the matter). For purposes of this motion, Brooks
 27 bears the burden of proving that the choice of forum provision contravenes California public
 28 policy by showing that he has somehow given up some remedy available to him under California
 law. This he has not done, so the Court need not address whether Brooks has also shown that
 California law should apply to these claims wherever they might be adjudicated.

1 and choice of law analyses when she argue[d] that enforcement of the forum selection clause
 2 [would] result[] in the application of a Washington law violative of California public policy.” *Id.*
 3 at 1104 (emphasis added and citations omitted). Here, Brooks has used the same impermissible
 4 tactic by basing his argument on the unfounded premises that California law should ultimately
 5 govern his claims and, assuming *arguendo* that he is right about the choice of law issue, that a
 6 court in England would not apply California law.

7 The Court should follow the reasoning of the decisions cited above and hold that the forum
 8 selection clause in the Sotheby’s Conditions of Business is enforceable because there is no
 9 evidence that it impermissibly contravenes any public policy of California, and it is premature to
 10 decide what law might be applied to Brooks’ claims if and when he pursues them in the parties’
 11 selected forum.

12 B. Brooks Had Reasonable And Sufficient Notice Of The Forum Selection Clause In
 13 Sotheby’s Conditions Of Business

14 Brooks’ only other argument in opposition to this motion to dismiss is that he did not have
 15 notice of the existence of the forum selection clause prior to purchasing the painting. Brooks does
 16 not, however, dispute the fact that the forum selection clause was in the auction catalogue or the
 17 fact that the one-page invoice he received from Sotheby’s made specific reference to the existence
 18 of the Conditions of Business. Aguilar Decl. Exs. A & B. Brooks also does not dispute the fact
 19 that he made 31 purchases from Sotheby’s London auctions prior to purchasing the painting at
 20 issue here and that each of these prior purchases was also made subject to Sotheby’s Conditions of
 21 Business and the same forum selection clause. Aguilar Decl. ¶6. Brooks’ only evidence regarding
 22 this issue is his statement that he “did not *notice* either the forum selection clause or the choice of
 23 law provision that I have since seen was on page 280 of the catalogue.” Declaration of Steven
 24 Brooks in Support of Plaintiff’s Opposition to Defendants’ Motion to Dismiss ¶2 (emphasis
 25 added). Brooks’ failure to read the clause is irrelevant to the issue of whether he had a reasonable
 26 opportunity to do so.

27 In the cases Brooks quotes involving cruise ship tickets, the Ninth Circuit has held that
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1 “the ‘proper test of reasonable notice is an analysis of the overall circumstances on a case-by-case
 2 basis, with an examination not only of the ticket itself, but also of any extrinsic factors indicating
 3 the passenger’s ability to become meaningfully informed of the contractual terms at stake.” *Deiro*
 4 *v. American Airlines, Inc.*, 816 F.2d 1360, 1363 (9th Cir. 1987). As Brooks also quotes in his
 5 opposition, the “surrounding circumstances to be considered include the passenger’s familiarity
 6 with the ticket, the time and incentive under the circumstances to study the provisions of the
 7 ticket, and any other notice that the passenger received outside of the ticket.” *Id.* at 1364.

8 Here, the facts indicate that Brooks had reasonable notice of the forum selection clause.
 9 An examination of the auction catalogue itself reveals that the “CONDITIONS OF BUSINESS”
 10 appear prominently at the top of page 278 of the catalogue followed by two short, set-off
 11 paragraphs announcing the importance of these conditions and that they set out the terms of the
 12 relationship between “Sotheby’s, Sellers and Bidders.” Aguilar Decl. Ex. A. The typeface of the
 13 text that follows is not “fine print” and is not materially smaller than the typeface of the text
 14 describing the provenance of the painting. Each section of the Conditions of Business is called out
 15 with a bold-faced heading, and the section relevant here appears at the very top of page of 280
 16 under the heading “**Law and Jurisdiction.**” *Id.* The Conditions of Business were not hidden
 17 from Brooks nor was he required to refer to some document other than the auction catalogue to
 18 learn the contents of the Conditions of Business. Sotheby’s then referenced these Conditions of
 19 Business again on the invoice sent to Brooks following his winning bid on the painting. *Id.* Ex. B.
 20 Sotheby’s communicated these conditions to Brooks in the context of his purchase of a single
 21 painting for \$96,000. There is no evidence that this was a snap decision by Brooks or that he did
 22 not have an ability *or sufficient incentive* to become meaningfully informed about the conditions
 23 under which he was spending \$96,000 on a single painting.

24 This was also not Brooks’ first experience purchasing something from a Sotheby’s auction
 25 in London subject to these Conditions of Business. Brooks had made 31 prior purchases and had
 26 had ample opportunity and incentive to learn and understand the terms under which he was
 27 entering into these transactions. Aguilar Decl. ¶6. The invoice Brooks received from Sotheby’s
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reflects the price paid by Brooks in Great Britain Pounds (“GBP”), not dollars and indicates that payment may be made directly to Sotheby’s bank *in London*. *Id.* Ex. B. All of these extrinsic factors are consistent with Sotheby’s condition that England would be the forum for any dispute arising from its auctions.

In sum, the question here is not whether Brooks actually read the forum selection clause,³ but rather whether he had a reasonable opportunity and incentive to do so under the circumstances. The Court should not countenance Brooks' arguments that this transaction is akin to obtaining monthly internet service or buying a cruise ship ticket. Brooks repeatedly participated in global art auctions in London pursuant to the Sotheby's Conditions of Business, and it is reasonable that he should be required to abide by those conditions now.

C. Brooks' Claims Are Covered By The Mandatory Forum Selection Clause And These Claims Should Be Dismissed Pursuant To 28 U.S.C. section 1406(a)

Defendants' opening memorandum stated (1) that all of Brooks' claims are governed by the forum selection clause; and (2) that where the proper venue under a forum selection clause is located in a foreign country, the court must dismiss the case for improper venue pursuant to Rule 12(b)(3) and 28 U.S.C. section 1406(a). Brooks' opposition does not address these issues, and Brooks has conceded that his claims are all governed by the forum selection clause and that dismissal is the proper result if the Court finds the clause enforceable.

Dated: June 10, 2013

SKAGGS FAUCETTE LLP

By: /s/
Jeffrey E. Faucette
Attorneys for Defendants SOTHEBY'S and
SOTHEBY'S, INC.

³ A fundamental tenant of contract law is that a party is bound by the terms of his contract, even if he chooses not to read them. *See, e.g., Upton v. Tribilcock*, 91 U.S. 45, 50 (1875) (“It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written.”)